U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 December 2005

CASE NO.: 2005-LDA-5

OWCP NO.: 02-136708

IN THE MATTER OF

P (b)(6) K (b)(6)
Claimant
v.

AITECH USA, INC.,
Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
Carrier

APPEARANCES:

Gary Pitts, Esq.
On behalf of Claimant

Richard Garelick, Esq.
On behalf of Employer/Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et. seq., and its extension, the Defense Base Act (DBA) 42 U.S.C. § 1651 et. seq., brought by P (b)(6) K (b)(6) (Claimant) against Aitech USA, Inc. (Employer) and Insurance Company of the State of Pennsylvania (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on May 9, 2005, in Houston, Texas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced 14 exhibits which were admitted, including Claimant's medical records and pre-employment physical, medical bill from Landstuhl Regional Medical Center, DOL LS-203 and 207 forms, Employer's response to request for admissions and answers to interrogatories, Claimant's earning statements from Employer, Claimant's 2003 tax return, RGV Engineering & Inspection, Inc.'s certificate of incorporation and 2004 1096 and 1097 forms, Claimant's resume and a news article of April 6, 2003 about death of reporter David Bloom from pulmonary embolism while in Iraq.[1] Employer introduced 7 exhibits which were admitted including Employer's first report of injury, Claimant's medical records, Claimant's discovery deposition and wage records, initial report and deposition of Dr. Jeffery D. Britton and medical report of Dr. Jamal Razzack.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The Parties are subject to the exclusive jurisdiction of the DBA.

2. The claimed injury (pulmonary embolism) occurred on June 25, 2004, at which time there was an Employer/Employee relationship.[2]

3. Employer was advised of the injury on July 4, 2004.

4. Employer filed a Notice of Controversison on August 20, 2004.

5. An informal conference was held on September 28, 2004.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Fact of injury/illness from the zone of special danger.

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[1] References to the transcript and exhibits are as follows: trial transcript- Tr.____; Claimant's exhibits- CX-___, p.___; Employer exhibits- EX-___, p.___; Administrative Law Judge exhibits- ALJX-__; p.___; JT. EX-___.

[2] . Employer subsequently in its brief stipulated to June 25, 2004 as the date of the claimed injury.

2. Nature and extent of disability.

3. Causation.

4. Average weekly wage.

5. Entitlement to temporary total disability benefits and/or temporary partial disability benefits.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant is a (b)(6) year old male born on (b)(6). (CX-4.p.1; Tr. 16). He has a high school diploma, plus college education from the (b)(6) and (b)(6) (b)(6) followed by technical training in penetrant, magnetic particle, ultrasonic, eddy current and radiographic metal testing. (CX-13). Employer hired Claimant on November 17, 2003 to do non-destructive material or pipeline inspection, including magnetic particle, radiographic, dye penetrant and visual testing. (Tr. 21-24).

Claimant worked initially for Employer in (b)(6) including (b)(6) and (b)(6). (Tr. 25). Employer eventually asked Claimant if he would be interested in working in Iraq where he would make $350.00 per day plus benefits. (Tr. 46). Claimant agreed and flew to Iraq on (b)(6), landing initially in Kuwait, then Baghdad and finally Kirkuk where he began his work of pipeline inspection. (Tr. 26, 27). Claimant worked for about (b)(6) months in Kirkuk or until (b)(6) when he came down with severe dehydration, diarrhea and eventually suffered from pulmonary embolism. (CX-6). Prior to April 30, 2004, Claimant's gross pay was $10,132.09. From May 14, 2004 to July 30, 2004, Claimant's gross pay was $13,152.44. (CX-8, 9).

B. Claimant's Testimony

Claimant described his education and work background as described above. Claimant testified that upon arriving in Kirkuk he found the project in total disarray with 26 different pipelines strung out with drillers unable to drill directional holes for the pipe to be pulled under the Tigris River. (Tr. 28). On occasion, Claimant would have to stop work and retreat to bunkers when attacked by mortars. (Tr. 29). Claimant worked in temperatures ranging from 115 to 130 degrees (Tr. 29, 30). Living quarters consisted of metal buildings that frequently lacked electricity and running water making it cooler and more comfortable to remain outside in the shade. (Tr. 31).

While working in Kirkut, Claimant came down with a severe case of diarrhea. After suffering with this condition for about a week, Claimant began to cough up chunks of blood whereupon the medic had Claimant transferred to Kirkuk Air Force Hospital. Claimant remained there for about a week. When his condition did not improve Claimant was medivaced to Kuwait and then Landstuhl Regional Medical Center where he was diagnosed with pulmonary embolism. (EX-2, Tr.35). When Claimant inquired about the cause, Dr. Cumkee, his military doctor, told him there were various reasons including being sedentary for long periods of time. (Tr. 38). Claimant testified that he had been initially inactive for about a week during which time he spent most of the day going between bed and toilet or sitting in a fold up chair. (Tr. 39). While at Landstuhl Claimant was treated with Levenox and Coumadin. (Tr. 40).

Upon returning to Houston Claimant was referred to a pulmonary specialist, Dr. Razzack, who continued Claimant on the same medication and told him not to work. (Tr. 41, 42). As of April 5, 2005, Dr. Razzack told him he could return to work when he finished the Coumadin. By May 9, 2005, Claimant had returned to work for Windstorm Inspections. (Tr. 43). As of the hearing Claimant had received no compensation or medical benefits. (Tr. 44).

On cross, Claimant testified that he heard Employer had shut the job down in Iraq weeks later because of a failure with subterranean drilling. (Tr. 48). While the job was not permanent in that it was not slated to last for years, it was open ended and could easily lead to jobs with other companies since Iraq had miles and miles of blown-up pipe. (Tr. 49). Although Claimant has started back working with RGV engineering as one of its officers, Claimant has yet to be paid. (Tr. 51, 52, CX-10, 11, 12).

C. Medical Reports from Dr. Jamal Razzack

Dr. Razzack, a specialist in pulmonary medicine, has treated Claimant since September 2, 2004. In a report dated September 2, 2004, Dr. Razzack described Claimant's condition in late June, 2004, as one of severe dehydration while working in Iraq followed by severe chest pain and cough productive of blood. Claimant was seen in the local infirmary and hospital, administered antibiotics and when his condition did not improve was transferred to Germany where a CAT scan of the chest showed a pulmonary embolism and pulmonary infarct. Claimant's condition improved when place on Levenox and Coumadin. When initially seen by Dr. Razzack Claimant was easily fatigue. Dr. Razzack impression was acute pulmonary embolism during the time of his dysentery and possible dehydration. Dr. Razzack was unsure Claimant had deep venous thrombosis and recommended further evaluation with a venous thrombophilia panel and a lower extremity Doppler with an echocardiogram if Claimant continued to have dyspnea on exertion. (CX-2, pp. 3, 4).

In a second report date April 27, 2005, Dr. Razzack recounted Claimant's medical history as noted above and stated that in September, 2004, he found Claimant to have persistent complaints of shortness of breath due to pulmonary embolism. Dr. Razzack advised Claimant not to work and placed him on Wafarin therapy for 6 months followed by a repeat CT scan of the chest which showed on residual scarring. Dr. Razzack concluded his report by saying:

> Since he has not had any recurrences and since this was his first episode with known predisposing factors (dehydration and sedentary state) long term anticoagulation is not recommended at this time. At this time he may return to regular work although he is advised to avoid situations resulting in severe dehydration and sedentary state.

(CX-2, p.2).

D. Medical Report and Deposition of Dr. J. D. Britton

Employer referred Claimant for medical evaluation to Dr. Britton, a specialist in occupational medicine. Dr. Britton examined Claimant on April 7, 2005. Part of the exam involved a medical, educational, and work history which included 7months of technical school training in 1973 for non-destructive welding inspection (NTD) followed by employment with Employer in the U.S. and then Iraq. Dr. Britton described Claimant's work conditions as adverse with temperatures of 130 degrees, long hours, insurgent mortar attacks, lack of electricity and limited exercise. Beginning in mid July, 2004, Claimant began to experience profuse and watery diarrhea. Despite attempts at and nutrition, the diarrhea persisted with Claimant experiencing severe chest pain and hemoptysis. Eventually after treatment at an Air Force hospital in Kirkut, Kuwait, and Landstuhl Medical Center in Germany, Claimant was diagnosed and treated for pulmonary embolism and transferred back to the U.S. The physical exam was essentially normal except for crackling rales in the left lung base that did not clear possessively.

Dr. Britton noted that he was not provided with all medical records and opined he was unable to make an association between the pulmonary embolus and pulmonary infarct and exposures to "oil fumes." Dr. Britton was unable to exclude an inherited or acquired venous thrombophilia and recommended a venous thrombophilia profile. (EX-6).

On August 24, 2005, Dr. Britton was deposed and testified that he did not believe there was an association of pulmonary problems and inhalation of oil fumes or immobility due to air travel. Dr. Britton could not exclude the presence of an inherited or acquired thrombophilia. However, the thrombophilia profile was performed and it ruled out any genetic predisposition or connection to the pulmonary embolism. Dr. Britton was unable to find a cause for the pulmonary embolism finding it to be idiopathic. However, Dr. Britton indicated possible risk factors including inactivity as the number one factor plus diarrhea and dehydration.

When cross examined, Dr. Britton was unable to find a cause for the embolism but admitted that the only factors he could point to as probable causes were inactivity, dehydration, and diarrhea. However, because he did not have all the medical records, he could no say for certain whether Claimant was dehydrated. (EX-9).

IV. DISCUSSION

A. Contention of the Parties

Employer claims that Claimant's pulmonary embolism was not casually related to Claimant's work in Iraq. More specifically, Claimant did not carry his burden of making a *prima facie* case to allow invocation of the Section 20(a) presumption, because the written reports of Dr. Razzack were tenuous at best suggesting a causal relationship between Claimant's pulmonary embolism and his employment in Iraq. Employer argues that Dr. Razzack after reciting Claimant's history does not conclude that dysentery or Claimant's employment in Iraq had anything to do with Claimant's embolism. Further, if Claimant met his burden invoking the Section 20(a) presumption, Employer rebutted it by meeting the minimal substantial evidence standard set forth in ***Ortco Contractors, Inc. v. Carpentier***, 323 F.3rd 283 (5th Ci3); ***Conoco, Inc,. v. Director, OWCP,*** 194 F.3d 684 (5th Cir. 1999). Once the Section 20(a) presumption is rebutted Claimant must then prove by a preponderance of the evidence that the embolism arose out of Claimant's work in Iraq. Employer contends there is no evidence to meet this standard particularly because Dr. Britton classified the cause as idiopathic. Finally, Claimant's average weekly wage should be calculated under Section 10(a) since Claimant worked 32 2/7 weeks in the previous year doing welding inspection. Employer argues that 32 2/7 weeks constitutes a substantial part of the year in accord with ***Duncan v. Washington Metropolitan Area Transit Authority,*** 24 BRBS 133 (1990) (finding 34.5 weeks to be "substantially" the whole of the year). If Claimant's earnings of $19,922.01 are divided by 32 2/7 weeks, $617.05 results as the average weekly wage (AWW). Employer also argues that since Section 10(b) cannot be applied inasmuch there was no comparable worker, Section 10(c) results in a similar AWW.

Claimant argues that in order to establish a *prima facie* case it does not have to establish that Claimant's medical condition was caused by his employment in Iraq, only that such work could have caused the harm or aggravated a pre-existing condition. ***Kelaita v. Triple A. Machine Shop,*** 13 BRBS 326 (1981). The evidence is clear and uncontroverted that Claimant's pulmonary embolism immediately followed admitted risk factors of dysentery, dehydration and inactivity, all of which he acquired in a zone of special danger. Employer did not rebut Claimant's *prima facie.* In fact, Dr. Britton eliminated all other possible causes. Further, Section 10(c) should be used to determine the appropriate AWW by using Claimant's weekly gross pay in Iraq of $1,587.88 which is reduced to the maximum compensation rate of $1,030.78 with Claimant entitled to temporary total disability from July 30, 2004 through April 27, 2005. ***James Zimmerman v. Service Employers International,*** 2004-LHC-927 (ALJ, March 25, 2005).

B. Credibility of Parties

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. ***Banks v. Chicago Grain Trimmers Association, Inc.,*** 390 U.S. 459, 467 (1968); ***Louisiana Insurance Guaranty Ass'n v. Bunol,*** 211 F.3d 294, 297 (5th Cir. 2000); ***Hall v. Consolidated***

Employment Systems, Inc.*,** 139 F.3d 1025, 1032 (5th Cir. 1998); ***Atlantic Marine, Inc. v. Bruce*,** 551 F.2d 898, 900 (5th Cir. 1981); ***Arnold v. Nabors Offshore Drilling, Inc.*,** 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. ***Banks, 390 U.S. at 467, 88 S. Ct. at 1145-46; ***Mijangos v. Avondale Shipyards, Inc.***, 948 F.2d 941, 945 (5th Cir. 1991); ***Huff v. Mike Fink Restaurant, Benson's Inc.***, 33 BRBS 179, 183 (1999). In this case, I find Claimant to be a straightforward and credible witness and credit his testimony about working conditions in Iraq which led to diarrhea, dehydration, inactivity and eventually pulmonary embolism as discussed below.

C. Causation

Section 2(2) of the Act defines injury as accidental injury or death arising out of or in the course of employment. 33 U.S.C. § 902(2)(2003). Section 20(a) of the Act provides a presumption that aids the claimant in establishing that a harm constitutes a compensable injury under the Act:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary - -
> (a) That the claim comes within the provisions of this chapter.

33 U.S.C. § 920(a) (2003).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. ***Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*,** 227 F.3d 285, 287 (5th Cir. 2000); ***Kier v. Bethlehem Steel Corp.*,** 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. ***Hunter***, 227 F.3d at 287. [T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. ***U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*,** 455 U.S. 608, 615, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). *See also* ***Bludworth Shipyard Inc., v. Lira*,** 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); ***Devine v. Atlantic Container Lines*,** 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer and a *prima facie* case must be established before a claimant can take advantage of the presumption). Once both elements of the *prima facie* case are established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. ***Hunter***, 227 F.3d 287-88.

In order to show harm or injury a claimant must show that something has gone wrong with the human frame. ***Crawford v. Director, OWCP*****,** 932 F.2d 152, 154 (2nd Cir. 1991); ***Wheatley v. Adler*****,** 407 F.2d 307, 311-12 (D.C.Cir. 1968); ***Southern Stevedoring Corp., v. Henderson*****,** 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode, and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. ***Adkins v. Safeway Stores, Inc.*****,** 6 BRBS 513, 517 (1978). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. ***Gooden v. Director, OWCP,*** 135 F.3d 1066, 1069 (5th Cir. 1998) (pre-existing heart disease); ***Kubin v. Pro-Football, Inc.*****,** 29 BRBS 117, 119 (1995) (pre-existing back injuries).

Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant must show the existence of working conditions that could conceivably cause the harm alleged beyond a mere fancy or wisp of what might have been. ***Wheatley***, 407 F.2d 307, 313 (D.C. Cir. 1968). A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. ***Hampton v. Bethlehem Steel Corp.***, 24 BRBS 141, 144 (1990) (finding a causal link despite the lack of medical evidence based on the claimant's reports); ***Golden v. Eller & Co***., 8 BRBS 846, 849 (1978), ***aff'd*****,** 620 F.2d 71 (5th Cir. 1980) (same). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or that condition existed at work that could have caused the harm. ***Bonin v. Thames Valley Steel Corp.***, 173 F.3d 843 (2nd Cir. 1999) (unpub.) (upholding ALJ ruling that the claimant did not produce credible evidence that a condition existed at work which could have cause his depression); ***Alley v. Julius Garfinckel & Co.,*** 3 BRBS 212, 214-15 (1976) (finding the claimant's uncorroborated testimony on causation not worthy of belief); ***Smith v. Cooper Stevedoring Co.***, 17 BRBS 721, 727 (1985) (ALJ) (finding that the claimant failed to meet the second prong of establishing a *prima facie* case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record).

For a traumatic injury case, the claimant need only show conditions existed at work that could have caused the injury. Unlike occupational diseases, which require a harm particular to the employment, ***Leblanc v. Cooper/T. Stevedoring, Inc.***, 130 F.3d 157, 160-61 (5th Cir. 1997) (finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are not treated as occupational diseases); ***Gencarelle v. General Dynamics Corp.*****,** 892 F.2d 173, 177-78 (2nd Cir. 1989) (finding that a knee injury due to repetitive bending stooping, squatting and climbing is not an occupational disease), a traumatic injury case may be based on job duties that merely require lifting and moving heavy materials. ***Quinones v. H.B. Zachery, Inc.***, 32 BRBS 6, 7 (2000), ***aff'd on other grounds***, 206 F.3d 474 (5th Cir. 2000). A claimant's failure to show an antecedent event will prohibit the claimant from establishing a *prima facie* case and his entitlement to the Section 20 presumption of causation.

In the present case, I find that Claimant clearly established a *prima facie* case that working conditions could have caused his pulmonary embolism. Employer rebutted that testimony with minimally substantial evidence from Dr. Britton that the cause was idiopathic.

Weighing the entire evidence, however, I am convinced that Claimant showed by a preponderance of evidence that his pulmonary embolism could have been caused by working conditions which produced dehydration, diarrhea and inactivity. Indeed, Dr. Britton listed those as leading risk factors for pulmonary embolism. In fact, they were the only identifiable factors in this case and were the ones found by Dr. Razzack when he discussed Claimant's pulmonary condition.

D. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d)(1); ***Staftex Staffing v. Director, OWCP*****,** 237 F.3d 404, 407 (5th Cir. 2000), ***on reh'g*** 237 F.2d 409 (5th Cir. 2000). Where neither Section 10(a) not Section 10(b) can be "reasonably and fairly applied," Section 10(c) is a catch all provision for determining a claimant's earning capacity. 33 U.S.C. § 910(c); ***Louisiana Insurance Guaranty Assoc. v. Bunol*****,** 211 F.3d 294, 297 (5th Cir. 2000); ***Wilson v. Norfolk & Western Railroad Co.*****,** 32 BRBS 57, 64 (1998). For traumatic injury cases, the appropriate time for determining an injured workers average weekly wage earning capacity is the time in which the event occurred that caused the injury and not the time that the injury manifested itself. ***Leblanc v. Cooper/T. Smith Stevedoring, Inc.*****,** 130 F.3d 157, 161 (5th Cir. 1997); ***Deewert v. Stevedoring Services of America*****,** 272 F.3d 1241, 1246 (9th Cir. 2001) (finding no support for the proposition that the time of the injury is when an employee stops working); ***McKnight v. Carolina Shipping Co.*****,** 32 BRBS 165, 172 (1998). In occupational disease cases, the appropriate time for determining an injured workers average weekly wage earning capacity is when the worker becomes aware, or should have been aware, of the relationship between the employment, the disease, and the death or disability. 33 U.S.C. § 910(i).

1. Section 10(a)

Section 10(a) focuses on the actual wages earned by the injured worker and is applicable if the claimant has "worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. 33 U.S.C. § 910(a); ***see also Ingalls Shipbuilding, Inc., v. Wooley***, 204 F.3d 616, 618 (5th Cir. 2000)(stating Section 10(a) is a theoretical approximation of what a claimant could have expected to earned in the year prior to the injury); ***Duncan v. Washington Metro. Area Transit Authority*****,** 24 BRBS 133, 135-36 (1990). Once a determination is made that the injured employee worked substantially the whole year, his average weekly earnings consists of "three hundred times the average daily wage or salary for a six-a-day worker and two-hundred and sixty times the average daily wage of salary for a five day worker. 33 U.S.C. § 910(a). If this mechanical formula distorts the claimant's average annual earning capacity it must be disregarded. ***New Thoughts Fishing Co., v. Chilton*****,** 118 F.2d 1028, n.3 (5th Cir. 1997); ***Universal Maritime Service Corp., v. Wright***, 155 F.3d 311, 327 (4th Cir. 1998).

2. Section 10(b)

Where Section 10(a) is inapplicable, the application of Section 10(b) must be explored prior to the application of Section 10(c). 33 U.S.C. § 910(c); ***Bunol*,** 211 F.3d at 297; ***Wilson***, 32 BRBS at 64. Section 10(b) applies to an injured employee who has not worked substantially the whole year, and an employee of the same class is available for comparison who has worked substantially the whole of the preceding year in the same or a neighboring place. 33 U.S.C. § 910(b). If a similar employee is available for comparison, then the average annual earnings of the injured employee consists of three hundred times the average daily wage for a six day worker, and two hundred and sixty times the average daily wage of a five day worker. *Id*. To invoke the provisions of his section, the parties must submit evidence of similarly situated employees. ***Hall v. Consolidated Employment Systems, Inc.***, 139 F.3d 1025, 1031 (5th Cir. 1998). When the injured employee's work is intermittent or discontinuous, or where otherwise harsh results would follow, Section 10(b) should not be applied. *Id*. at 130; ***Empire United Stevedores v. Gatlin,*** 936 F.2d 819, 822 (5th Cir. 1991).

3. Section 10(c)

If neither of the previously discussed sections can be applied "reasonably and fairly," then a determination of a claimant's average annual earnings pursuant to Section 10(c) is appropriate. 33 U.S.C. § 910(c); ***Bunol***, 211 F.3d at 297-98; ***Gatlin***, 936 F.2d at 821-22; ***Browder v. Dillingham Ship Repair***, 24 BRBS 216, 218-19 (1991). Section 910(c) provides:

> [S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

The judge has broad discretion in determining the annual earning capacity under Section 10(c). ***James J. Flanagan Stevedores, Inc., v. Gallagher*,** 219 F.3d 426 (5th Cir. 2000)(finding actions of ALJ in the context of Section 10(c) harmless in light of the discretion afforded to the ALJ); ***Bunol*,** 211 F.3d at 297 (stating that a litigant needs to show more than alternative methods in challenging an ALJ's determination of wage earning capacity); ***Hall*,** 139 F.3d at 1031 (stating that an ALJ is entitled to deference and as long as his selection of conflicting inferences is based on substantial evidence and not inconsistent with the law); ***Wayland v. Moore Dry Dock***, 25 BRBS 53, 59 (1991). The prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." ***Gatlin*,** 936 F.2d at 823; ***Cummins v. Todd Shipyards*,** 12 BRBS 283, 285 (1980). The amount actually earned by the claimant is not controlling. ***National Steel & Shipbuilding v. Bonner*,** 600 F.2d 1288, 1292 (9th Cir. 1979). In this context, earning capacity is the amount of earnings that a claimant would

have had the potential and opportunity to earn absent the injury. ***Jackson v. Potomac Temporaries, Inc.*,** 12 BRBS 410, 413 (1980).

In this case, I find it inappropriate to use Section 10(a) since Claimant was paid for 7 days in Iraq and Claimant's 32 2/7 weeks did not represent substantially the whole year prior to injury inasmuch as Claimant spent 7 months of 2003 in technical school. Since there are no comparable workers, Section 10(c) must be applied. Using this method, I find it more appropriate to take his earnings over the past year of $19,922.01 and divide them by 32 2/7 (32.285) weeks resulting in an AWW of $617.06 with a compensation rate of $411.39. This is more appropriate than just using his wages in Iraq since that job was admittedly of limited duration.

E. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. ***Avallone v. Todd Shipyards Corp.*,** 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. ***Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP***, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. ***See Grant v. Portland Stevedoring Company, et al.*,** 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

F. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from July 30, 2004 to April 27, 2005 based on an average weekly wage of $ 617.06, and a corresponding compensation rate of $411.39.

2. Employer shall pay Claimant for all past and future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

3. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

4. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge